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CURRENT EVENTS.

AN AILANTHUS TREE HELD TO BE A NUISANCE.—The Maryland Circuit Court in Cecil County recently had occasion to pass upon the question whether a shade tree of the variety known as the Ailanthus is a public nuisance, because of the peculiar offensive odor it exhales when in bloom, and subject to removal as such by the municipal authorities. The case was Kerr v. Town of Elkton, and the evidence showed that the tree in question, during the two weeks it was in bloom, in June of each year, emitted an odor so offensive to many of those who resided in the neighborhood, that they were unable to occupy their porches in the evening and morning, or to keep open their windows in the front of their houses; and that one lady who resided on the opposite side of the street, was so affected by it that she was sick every year as long as the tree was in bloom. The court in delivering its opinion on this state of facts said: "It is certainly true that the owners or occupiers of dwelling-houses, whether in the city or country, have the right to enjoy pure and wholesome air; that is, as pure and wholesome as their local situation can reasonably supply; and any act which materially corrupts or pollutes the air, done without authority or justification, is strictly a nuisance. There is no distinction between any of the cases, whether it be smoke, smell, vapors or gas. The owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement any one or more of those things in such a way as materially to interfere with the ordinary comfort of the occupiers of such neighboring tenement.[1] And if he does, a court of equity will, on proper application, restrain him by a writ of injunction, and it will most certainly render him no aid in an attempt to resist the proper authorities in their efforts to remove or abate the nuisance."

PETTY JUDICIAL OFFICERS.—The press of South Carolina are vigorously discussing the abuses incident to the system of justices of the peace, or, as they call them in that State, "Trial Justices." These officials, like justices of the peace in most of the other States, are compensated for their services by fees taxed as costs against the unsuccessful litigant, and in many cases it is claimed that the pay is insufficient. Says the *Easley Messenger*, "The legislature claims to be progressive and yet takes no steps to improve the trial justice system. It progresses the wrong way. Because it reduces instead of increasing the pay of these officers. How on earth can the trial justice at Pickens Court-house be expected to do, and do well, all the criminal business which is brought before him for the petty sum of sixty dollars a year? Yet this is the pay. Good pay secures good work, and nothing else will or can secure it." As to the inherent defect of the system the *Abbeville Press and Banner*, says: "We think the radical and vital error lies in the fact that a trial justice's fees may be affected by his decisions. We believe that it takes a high order of man to hold the scales in exact equipoise when his own interests are affected. No one would think of making a circuit or Supreme court judge's fees contingent upon the decisions he might render. A trial justice is a judicial officer, and should be governed by the same intelligent sense of justice that controls the higher office, and the temptation to do a doubtful act should be removed." This language is equally applicable to the system that exists in nearly all the other States. The evil is a serious one, and should have the attention of the public. It is really a singular fact that the law-makers who have in all of the States taken such pains to make the judicial office in its higher grades independent of all external influence, should fancy that the class of men who are naturally selected for the office of justice of the peace can withstand the moral strain induced by the fact that their compensation in many cases is contingent upon their decision. The false economy which refuses to these officers a salary and offers to judicial officers of all grades a compensation so meagre as to preclude the filling of these positions by the men best fitted for them, is the source of a very grave danger.

[1] Adams v. Michael, 38 Md. 123.

DAMAGES FOR NEGLIGENTLY MUTILATING A CORPSE.—The Supreme Court of South Carolina has recently decided a very singular, and we believe unprecedented, case as to liability of a railway company in damages for negligently running a train over and mutilating a dead body. The action was brought by the plaintiff, as administrator of the deceased, and in addition to the injuries to the corpse alleged the destruction of the apparel in which it was clad and a silver watch on the person. The whole issues were referred, by consent, to a special referee, who found, as a matter of law, that the action of the administrator could be sustained; that the amount of recovery was not limited to the value of the clothing, which he found to be $30, as a matter of fact, that the mutilation of the dead body and the destruction of the wearing apparel resulted from the careless and negligent action of the defendant and therefore found for the plaintiff damages in the sum of $10,000. The decision of the referee was reversed upon exceptions by the Circuit Judge, who adjudged that the alleged negligence by defendant had not been proved, and that the plaintiff could not maintain the action as administrator because he had no property in the dead body of the intestate, and he dismissed the complaint. The Supreme Court held, upon appeal, that in the absence of all authority, and looking at the Act which authorizes administration and defines the duties and powers of administrators, and describes the property which by operation of law becomes his, it is constrained to the conclusion that so far as the action is founded on the mutilation of the dead body of the deceased by the defendant company, whether accidental, wilful or negligent, it cannot be sustained by the plaintiff. This, however, does not apply to the clothes in which the body was clad and the silver watch upon the person. As to these the administrator was the legal owner, and his appointment, though made after the occurrence, reacted to the death, his title commencing at that time. As to these the action was of course maintainable.

NOTES OF RECENT DECISIONS.

PARTNERSHIP—DISSOLUTION BY DEATH OF PARTNER.—The case of *McNeish v. Hulless Oat Co.*,[2] is authority for the doctrine that while the death of a partner generally works a dissolution of the partnership, it does not have that effect when the partnership contract shows the intention of the parties to give it a continuing existence; and that it is a question for the jury to determine on a reasonable construction of the articles of agreement, interpreted by the kind of business contemplated and the manner of transacting it, whether it was the intention that the partnership should be continuing, or dissolved by the death of a partner. Say the court: "The partnership contract may be such as to clearly show that it was the intention of the parties to it to give it a continuing existence, although there should intervene a withdrawal of some of its members by transfer of stock, or their interest in the partnership, or by death. Hence, where, as in the case at bar, the partnership takes the form of a joint stock association, with shares transferable, with the form of a corporation, with regular officers, meetings, and records, with a limitation upon the agency of the different partners in the transaction of the partnership business, and the transfer of the transaction of the business wholly to a general agent when one or more of the partners decease, the question that arises, is, whether, upon a fair and reasonable construction of the articles of agreement, interpreted by the kind of business contemplated, and the manner of transacting the business, it was the intention that the partnership should be continuing, or that it should be dissolved at the death of one or more of the partners. In Tenney v. N. E. Protective Union,[3] and in Walker v. Wait,[4] it is held, that, in this class of cases, it is proper to submit to the trier of facts to determine whether the partners contemplated and intended, under the articles of partnership, and all the facts and circumstances attending the transaction of the partnership business, both before and after such death, and the provisions for the transfer of the

[2] 57 Vt., 316 (Adv. Sheets).
[3] 37 Vt., 64.
[4] 50 Vt., 668.

stock, that the partnership should continue and go forward in its business notwithstanding some of the members might decease."

CUSTOM—TO BE VALID MUST BE REASONABLE.—The case of *Anewalt v. Hummell*,[5] recently decided by the Supreme Court of Pennsylvania, contains an illustration of the rule that a custom to be valid must be reasonable. A tenant on leaving his landlord's premises refused to pay for the hay and fodder that he found there when he took possession, and which he had used for his own purposes. Suit having been brought against him by his landlord, he set up a custom among farmers to allow this to their tenants. The evidence failed to sufficiently establish such a custom, but the court held that in such a case it would make no difference even if it had been otherwise, saying: "Moreover, had the proof been clear, it was a bad custom. It was so wholly unreasonable, that it could not be set up as a defense. It was a custom that the tenant may use the property of his landlord without making compensation. The tenant might, with equal propriety, have set up a custom that his landlord should pay his debts, or give him his share of the crops. It is a familiar rule of law that a custom, to be valid, must be reasonable."

CONTRIBUTORY NEGLIGENCE—USE OF CITY SIDEWALKS FOR PLAY IS NOT.—In the case of Keefe v. City of Chicago,[6] the Illinois Supreme Court recently passed upon the question whether a city is bound to keep its sidewalks in repair for the use of children playing thereon as well as for persons passing over them, and held that it was its duty to do so; and that a child playing, rolling his hoop, upon a sidewalk and injured in consequence of a defect in it, is not thereby guilty of contributory negligence. Say the court, upon a motion for rehearing: "A sidewalk is for the passage of persons only, and we have not had in contemplation any case of it otherwise. Whether it be passed over for business or for pleasure, or merely to gratify idle curiosity, we think the use is lawful. A child may lawfully be upon the sidewalk for pleasure only, that is to say, for play, and the city owes the same duty to have the sidewalk in a reasonably safe state of repair in respect of it that it does in respect of those who are on the sidewalk passing to or returning from their places of business or abode. It may be true that the child will be less careful in its mode of using the sidewalk while playing than the business man will be while traveling to or from his place of business or abode; but this belongs to the domain of fact, and not to that of law. It may be so in most cases, it is not inevitably so in all cases. It is for the jury, not the court, to say what, in a given case, was the conduct of the parties. Our attention is called to an expression used in City of Chicago v. Starr,[7] wherein it is said: 'For it is to be borne in mind that it is not the duty of the City of Chicago to make its streets a safe playground for children. That is not the purpose for which streets are designed.' This expression does not occur in the statement of a legal principle, nor in the argument of a legal proposition, but it occurs in an argument upon a question of fact purely—namely, whether, in that case, the intestate was guilty of that degree of contributive negligence which precluded a recovery. At that time this court reviewed on questions of fact as well as of law, and often these questions were so intermingled in the discussion that it required some effort and care to distinguish between them. It was, in the case referred to, assumed as a matter of fact that children, in playing, will be more careless than persons who are simply passing along. And the only legal proposition is one that is implied in the argument; and that is that the measure of duty of the city in regard to its streets, is limited by the necessity of the ordinary modes of traveling or passing along the streets. If they were not kept up to this requirement, and children in playing did not subject them to greater burdens, or essentially different uses, certainly it was not contemplated; and the fact of the children being at play should bar a recovery for injuries resulting from the condition of the streets."

[5] 42 Leg. Int., 385.
[6] 18 Leg. News, 26.
[7] 42 Ill., 177.

"ACCIDENTS ARE NOT CRIMES."

The best known and most frequently cited of the old cases wherein accident has been held to be non-punishable as a crime, are undoubtedly Hull's Case, Levett's Case and the case reported by Mr. Justice Foster.

In Hull's Case,[1] there was a difference of opinion among the judges. Hull was tried at the Old Bailey in 1664 for the manslaughter of one Cambridge, and the evidence was (in the quaint language of the report) "that there were several workmen about building of a house by the horse-ferry, which house stood about thirty feet from any highway or common passage; and Hull being a master workman (about evening when the master workman had given over work, and when the laborers were putting up the tools) was sent by his master to bring from the house a piece of timber which lay two stories high; and he went up for that peice of timber, and before he threw it down, he cried out aloud, 'stand clear,' and was heard by the laborers, and all of them ran from the danger, but only Cambridge, and the piece of timber fell upon him and killed him." Lord Chief Justice Hyde thought the prisoner guilty of manslaughter on the ground that he should have let it down by a rope; if he chose to throw it down he did so at his peril. But the other two Judges—Wylde and Kelyng—thought it misadventure and not a crime. Because Hull was simply following the custom of workmen of his degree, and taking care to warn passers-by, they held him not guilty. "We put the case," says Kelyng in his report, "a man lopping a tree, and when the arms of the tree were ready to fall, calls out to them below, 'take heed,' and then the arms to the tree fall and kill a man, this is misadventure, and we showed him Poulton-de-pace, 120, where the case is put and the book cited and held to be misadventure; and we said this case in question is much stronger than the case where one throws a stone or shoots an arrow over a wall or house, with which one is slain; this in Kelloway, 108, and 136 is said to be misadventure. But we did all hold that there was a great difference twixt the case in question, the house from which the timber was thrown standing thirty feet from the highway or common footpath and the doing the same act in the streets of London; for we all agreed that in London that if one be a cleansing of a gutter, call out to stand aside, and then throw down rubbish or a piece of timber by which a man is killed, this is manslaughter being in London, there is a continual concourse of people passing up and down the streets, and a new passenger who did not hear him call out, and therefore the casting down any such thing from a house into the streets, is like the case where a man shoots an arrow or gun into a market place full of people, if any one be killed it is manslaughter; because in common presumption, his intention was to do mischief, when he casts or shoots anything which may kill among a multitude of people; but in case that a house standing in a country town where there is no such frequency of passengers, if a man call out there to stand aside, and take heed and then cast down the filth of a gutter, etc., my brother Wylde and I held that a far differing case from doing the same thing in London. And because my Lord Hyde differed in the principal case, it was found specially; but I take the law to be clear that it is but misadventure."

In Levett's Case,[2] the special verdict found that Levett and wife being in bed at night and asleep, "one Martha Stapleton, their servant, having procured the said Frances Freeman to help her about house-business, about twelve of the clock at night, going to the doors to let out the said Frances Freeman, conceived she heard thieves at the door offering to break them open; whereupon she, in fear, ran to her master and mistress, and informed them that she was in doubt that thieves were breaking open the house-door. Upon this he arose suddenly and fetched a drawn rapier. And the said Martha Stapleton, lest her master and mistress should see the said Frances Freeman, hid her in the buttery. And the said Levett and Helen, his wife, coming down, he with his sword searched the entry for thieves; and she, the said Helen, espying in the buttery the said Frances Freeman, whom she knew not, conceiving she had been a thief, crying to her husband in great fear, said to him, "Here they be that would undo us." Thereupon

[1] Kelyng, 40 (1664).

[2] Cro. Car., 538.

the said William Levett, not knowing the said Frances to be there in the buttery, hastily entered therein with his drawn rapier, and being in the dark, and thrusting with his rapier before him, thrust the said Frances under the left breast, giving her a mortal wound, whereof she instantly died; and whether it was manslaughter they prayed the discretion of the court—and it was resolved, that it was not; for he did it ignorantly without intention of hurt to the said Francis; and it was then so resolved."

In the case reported by Mr. Justice Foster,[3] the report says: "Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbors to take a dinner at the house of their common friend. He carried his gun with him hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was, she having brought it a part of the way. He taking it up touched the trigger; and the gun went off, killing his wife, whom he dearly loved. It came out in evidence that while the man was at church a person belonging to the family, privately took the gun, charged it and went after game; but before the service at church was ended, returned it loaded to the place whence he took it, and when the defendant, who was ignorant of all that had passed, found it, to all appearance, as he had left it. I did not inquire," says Mr. J. Foster, whether the poor man had examined the gun before he carried it home; but being of opinion upon the whole evidence that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him, and he was acquitted." The cases of accident which have become the subject of prosecutions for homicide in the courts, and which have been decided to be not punishable as crimes, may be devided into five divisions, each marking the transaction or occupation in which it arose, viz.:

I. The Ordinary Actions of Life.

II. The Use of Dangerous Agencies.

III. The Use of Horses.

IV. The Cure of Disease.

V. The Legal Use of Force.

I. The old cases just cited fall under the first head, as do several modern ones.[4]

In R. v. Waters,[5] W. being on board a ship, and B. in a boat alongside, had a dispute about payment for some goods, both being intoxicated, W. to get rid of B., pushed away the boat with his foot; B. reaching out to lay hold of a barge, to prevent his boat from drifting away, overbalanced himself and fell into the water and was drowned. It was held that W. was not guilty of manslaughter.

In R. v. Bradshaw,[6] the prisoner was charged with killing, in a game of foot ball, a player on the opposite side. It appeared that during the game the deceased was "dribbling" the ball along the side of the ground, in the direction of one of the goals, when he was met by the prisoner, who was running towards him to get the ball from him, or prevent its further progress; both players were running at considerable speed; on approaching each other, the deceased kicked the ball beyond the prisoner, and the prisoner, by way of "charging" the deceased, jumped in the air, and struck him with his knee in the stomach. The two met, not directly but at an angle, and both fell. The prisoner got up unhurt, but the deceased rose with difficulty, and was led from the ground. He died next day, after considerable suffering, the cause of death being a rupture of the intestines. Witnesses were called from both teams, whose evidence differed as to some particulars, those most unfavorable to the prisoner alleging that the ball had been kicked by the deceased, and had passed the prisoner before he charged; that the prisoner had, therefore, no right to charge at the time he did, that the charge was contrary to the rules and practice of the game, and made in an unfair manner, with the knees protruding; while those who were more favorable to the prisoner, stated that the kick by the deceased and the charge by the prisoner were simultaneous, and that the prisoner had, therefore, according to the rules and practice of the game, a right to make the

[3] Fost., 265.

[4] McGuire v. State, 43 Tex. 210 (1875); Robertson v. State, 2 La. 239; State v. Benham, 23 Iowa, 164 (1867); Pipe v. State, 3 Tex. (App.) 56 (1877).

[5] 6 C. & P. 328 (1834).

[6] 14 Cox, 83 (1878).

charge, though these witnesses admitted that to charge by jumping with the knee protruding was unfair. One of the umpires of the game stated that, in his opinion, nothing unfair had been done. Lord Bramwell, in summing up, said: "The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death, and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons can by agreement go out to fight with deadly weapons, doing, by agreement, what the law says shall not be done, and thus shelter themselves from the consequences of their acts. Therefore, in one way, you need not concern yourselves with the rules of foot-ball. But, on the other hand, if a man is playing according to the rules and practice of the game, and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case, he would be guilty of a criminal act, and you must find him guilty; if you are of a contrary opinion you will acquit him." His lordship carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country, all of which were no doubt attended with more or less danger." The verdict was *not guilty*.

II. In Robertson v. State,[7] several persons being together in the evening finishing up some of the days' work, had a playful altercation, during which one of them, in sport, pointed an old pistol, thought to be unloaded, at another, which went off and killed the latter. It was held that the person causing the death was not guilty of involuntary manslaughter within the Code of Tennessee. "Negligence," said the court, "in the performance of a lawful act, and *a fortiori*, negligence in sport, may indeed make the act unlawful, if the person see danger probably arising therefrom to others, and yet persists.[8] But the careless use of a dangerous article or instrument in ignorance, or with a laudable purpose, is not necessarily unlawful.[9] Mere negligence, not only with no intent to do harm, but under the belief that no harm was possible, is clearly wanting in every essential element of crime."

This division is illustrated in the cases of accidents arising from the management of steam, and death resulting from the action of this dangerous agency; as, for example, a steam engine. In R. v. Gregory,[10] the captain and engineer of a steamboat whose boiler burst and killed several passengers, was indicted for their manslaughter. They were acquitted, as were also the firemen in U. S. v. Taylor.[11]

III. If the driver of a conveyance use reasonable care and diligence, and an accident happen through some chance which he could not forsee or avoid, he is not criminally liable.[12] In R. v. Mastin,[13] A and B were riding very fast along a highway, as if racing. C was ahead on a horse. A road by him all right, but B rode against C's horse, whereby C was thrown and killed. It was held that A was not guilty of manslaughter. In R. v. Dalloway,[14] the prisoner being indicted for the manslaughter of one Clarke, it appeared that he was standing up in a spring cart, and hav- the conduct of it along a public thoroughfare. The cart was drawn by one horse. The reins were not in the hands of prisoner, but loose on the horse's back. While the cart was so proceeding down the slope of a hill, the horse trotting at the time, the deceased child, who was about three years of age, ran across the road before the horse, at the distance of a few yards, and, one of the wheels of the cart knocking it down and passing over it, caused

[7] 2 Lea., 239.

[8] See Lee v. State, 1 Col. 62.

[9] Ann v. State, 11 Humph. 159.

[10] 4 F. & F. 153; See R. v. Green, 7 C. & P. 156 (1835); R. v. Allen, Id. 153 (1835); 2 F. & G. 153.

[11] 5 McLean, 22 (1851).

[12] R. v. Murray, 5 Cox, 509 (1852).

[13] 6 C. & P. 396 (1834).

[14] 2 Cox, 273 (1847).

its death. It did not appear that the prisoner saw the child in the road before the accident. Spencer, for the prosecution, submitted that the prisoner, in consequence of his negligence in not using reins, was responsible for the death of the child, but Erle, J., in summing up to the jury, directed them that a party neglecting ordinary caution, and, by reason of that neglect, causing the death of another, is guilty of manslaughter; that if the prisoner had reins, and by using the reins could have saved the child, he was guilty of manslaughter; but that if they thought he could not have saved the child by pulling the reins, or otherwise by their assistance, they must acquit him. The jury acquitted the prisoner.

IV. The cases of physicians and surgeons accidentally killing patients in an endeavor to cure them, by mistakingly using the wrong remedies, have come before the criminal courts very frequently. In R. v. Williamson,[15] the prisoner had been in the habit of acting as a man midwife, and in one instance by his ignorance of the proper treatment had caused the death of a woman he was attending. He was acquitted, "To substantiate the charge of manslaughter," said Lord Ellenborough, C. J., "the prisoner must have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and, from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill. It would seem that, having placed himself in a dangerous situation, he became shocked and confounded. I think that he could not possiby have committed such mistakes in the exercise of his unclouded faculties; and I own that it appears to me that if you find the prisoner guilty of manslaughter, it will tend to encompass a most important and anxious profession, with such dangers as would deter reflecting men from entering into it."

In R. v. Spencer,[16] the prisoner was indicted for the murder of Clara Simpkin. He was a medical man, and had given the woman strychnia instead of bismuth. Willes, J., told the jury that the prisoner being a competent man, and properly educated in his profession, about which there seemed to be no doubt, this was not like the case of a quack who had not skill to master what he had undertaken, or who, from any bad motive, committed the act with which he was charged. Before they could find the prisoner guilty they must trace what he did to an evil mind. Here there was clearly no dishonest feeling, as the prisoner took some of the medicine himself. There being, therefore, nothing intentional, there were three modes in which the strychnia could have been administered to the deceased. First, through gross negligence on the part of the prisoner. He might have kept his ordinary drugs and his poisons in such a way that he could not tell what he was using. That *might* have been so, but it was not sufficient that it might have been so; the prosecution was bound to show that it must have been so. Secondly, the poison might have been administered by mistake, but a blunder alone would not render the prisoner criminally responsible. He had heard an eminent judge say, that if a man were for once to mistake his right hand for his left, such a mistake would not be a crime, whatever consequences it might involve. Thirdly, it was possible that the strychnia got into that bottle through the accident of some one else. If so, the accident was most lamentable; but it would be still more lamentable that the prisoner should be held criminally responsible for it. He would put an illustration: if a person had a bull or other dangerous animal, and he put him into a field where was there no footpath, and some one else let it out without his knowledge, and it killed some one, that would not be manslaughter by the owner of the bull, and it would be very hard to assume that he let it out. If the jury thought that the prosecution had made out a case in which the circumstances showed such gross and culpable negligence as would amount to a culpable wrong, and show an evil mind, they ought to convict the prisoner, if not, they ought to acquit. The jury returned a verdict of not guilty, and Willes, J., stated that he quite concurred in it.

[15] 3 C. & P. 635 (1807).
[16] 10 Cox, 525 (1867).

In R. v. Noakes,[17] the prisoner was indicted for the manslaughter of one Samuel Boys. The prisoner was a chemist and druggist, and the deceased dealt with him for drugs, and and had been accustomed for many years to send to him for aconite—which is a deadly poison—as a liniment. The prisoner was in the habit of using bottles of a particular make and color to contain poison; but on this occasion the deceased had sent his own bottles. He had been ordered to take thirty drops of henbane, and also to use aconite as a liniment, and he had sent two bottles to the prisoner, one for the aconite and the other for the henbane. The bottle for the henbane, (both bottles being of the ordinary kind) had on it a label bearing that word, and also in smaller letters, "30 drops at a time," which for aconite would be a deadly dose taken internally. The prisoner himself filled the bottles, and through some mistake put the aconite into the henbane bottle. The deceased took a dose of it, and it proved almost instantly fatal, with symptoms of poisoning by aconite. Erle, C. J., strongly put it to the jury that they ought not to call upon the prisoner for his defense; and that the case was not sufficiently strong to warrant them in finding the prisoner guilty on a charge of felony. They could not, he said, convict on such a charge, unless there was such a degree of complete negligence as the law meant by the word felonies. Now, no doubt there ought to be due care and caution in the dispensing of deadly drugs; but this was the case of a chemist, put out of his ordinary course by the customer sending bottles of his own. And though, no doubt, there was negligence in not observing the label on the bottle, on the other hand, it was the case of a customer who had for years been sending for aconite, and only rarely for henbane. Without saying that there might not be evidence of negligence in a civil action, he did not think that there was sufficient to support a conviction in a criminal case. The verdict was not guilty. In *re* Finney,[18] the prisoner who was an attendant at a lunatic asylum, in giving a patient a bath, by mistake, turned on the hot water instead of the cold, which scalded him to death. In charging the jury, Lush, J., said: "To render a person liable for neglect of duty, there must be such a degree of culpability as to amount to gross negligence on his part. If you accept the prisoner's own statement, you find no such amount of negligence as would come within this definition. It is not every little trip or mistake that will make a man so liable." The prisoner was acquitted. Other English cases are to the same effect. See R. v. Van Butchell.[19]

The first American case where the subject is carefully considered is Com. v. Thompson,[20] decided in the Supreme Judicial Court of Massachusetts in 1809. The evidence reported is quite lengthy; briefly the prisoner was an ignorant quack who had three remedies for everything, which he called coffee, well-my-gristle and ram-cats. He undertook to cure a man in a country town, and persisted in giving him emetics until he died. Several physicians testified that the treatment was the worst possible, but it also appeared that there were persons who had recovered after taking it. The Chief Justice said: "The court were all of opinion notwithstanding this ignorance, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter.

To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by prescription. And it is not felony, if through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient, contrary to his expectation, should die. The death of a man killed by voluntarily following a medical prescription cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge or probable information of the fatal tendency of the prescription that it may be reasonably presumed by the jury to be the effect of obstinate, wil-

[17] 4 F. & F., 921 (1866).
[18] 12 Cox, 625 (1874)
[19] 3 C. & P. 629 (1829); B. v. Macleod, 12 Cox, 535 (1874).
[20] 6 Mass., 134.

ful rashness at the least, and not of an honest intention and expectation to cure.

In Rice v. State,[21] the prisoner called himself a botanic physician, and being employed to cure a woman, kept her in a steam bath until she became so weak that she died. He was indicted for manslaughter in the fourth degree under a Missouri statute which declares that "every other killing of a human being by the act, procurement, or culpable negligence of another, which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this article to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." The prisoner was convicted. He appealed to the Supreme Court, where his conviction was reversed. "In order to bring the offense within the provision," said Scott, J., "it must appear that it was manslaughter at common law. Manslaughter is defined to be the unlawful killing of another without malice, either express or implied, which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act.[22] Thus, to make the defendant guilty, it must be made to appear that it was unlawful for him to administer physic to the deceased with his consent. We are not aware of the existence of a law which prohibits any man from prescribing for a sick person with his consent, if he honestly intended to cure him by his prescription, however ignorant he may be of medical science. If a person assumes to act as a physician, however ignorant of medical science, and prescribes with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter; but if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may reasonably be presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter, at least, though he might not have intended any bodily harm to the patient."

V. In State v. Obershaw,[23] a constable in pursuit of a criminal who had escaped from his custody, saw a man running away from him whom, in the dim light of the morning, he took to be his prisoner. He called upon him to halt, and not being obeyed, fired at and wounded the man, who turned out not to be his prisoner. The court instructed the jury that the officer was criminally liable if he shot at and killed another than an escaping prisoner. On appeal this was held erroneous —the prisoner being indicted and convicted of wounding with culpable negligence. "This instruction," said the court, "would perhaps be unexceptionable in a civil suit for damages. But in a criminal prosecution, where intent is always of the very essence of possible guilt, it is open to various objections. There is a startling incongruity in the proposition, that a man may lawfully do a thing, and may do it with the very best and purest intentions, and may yet be punished as a criminal for the act. There are many cases in which a man may be held liable in damages for the consequences of an act which was never forbidden by the law. An error in judgment or a mistake of fact may make him so responsible, even though he never had a thought of doing any wrong. But in criminal law, even a homicide may be excusable, where the perpetrator is innocent of any wrongful intent, actual or implied.[24] There are cases again in which mere recklessness is frowned upon by the law, equally with wilfulness in wrong doing. This is because a certain degree of caution, in the doing of lawful acts which may possibly lead to harm without it, is as much a civil duty as is the refraining from wilful injury. A failure to observe such a proper caution is the very gist of the crime which the indictment in this case charges, and which the statute under which it is framed was designed to cover. Thus, an officer, under circumstances in which he may properly shoot at a criminal fugitive, may recklessly and without caring or attempting to inform himself of the identity of the person aimed at, commit a fatal mistake, which will bring him precisely within the law forbidding such

[21] 8 Mo. 561 (1844). And see State v. Schulz, 13 Cent. L. J. 188, a similar case.

[22] 4 Black., 191.

[23] 11 Mo. (App.) 415 (1881).

[24] State v. McDonald, 7 Mo. App. 510.

culpable negligence. But if there be no recklessness, and no failure of the caution duly appropriate to the determining of the identity of the fugitive, we are at a loss to perceive upon what principle it can be said, whatever may be the event, that the officer will have incurred a criminal liability. Under the present indictment there can be no conviction unless there was culpable negligence. Yet the instruction holds that conviction must result from a shooting of the wrong man, whether there was negligence or not. He may lawfully do the act—it may even clearly appear to be his bounden duty to do it—and yet he must assume all the peril, and must be punished if injury result for an error that is neither reckless nor wilful."

On the same principle, one who, while defending himself from an attack, accidentally kills a third person, not the attacker, is not guilty of murder or manslaughter.[25] And it has been held that even a rioter is not guilty of murder or manslaughter for the accidental killing of an innocent person by those engaged in suppressing the riot.[26] In Com. v. Campbell,[27] a military force being called out to suppress a riot in Boston, fired upon the mob, and killed an innocent bystander named Currier. Campbell, a rioter, was indicted for his murder. On the trial before Bigelow, C. J., the attorney general asked this instruction: "That whether Currier was killed by a shot from within or without the armory, each and all of the rioters were guilty of homicide." The instruction was refused.

JOHN D LAWSON.

[25] Aaron v. State, 31 Ga. 167 (1860); Plummer v. State, 4 Tex. (App.) 310 (1878); McPherson v. State, 22 Ga. 487 (1857); Horrigan & Thompson Cases on Self Defense.

[26] Com. v. Campbell, 7 Allen, 541 (1863).

[27] 7 Allen, 541 (1863).

TROVER FOR SHARES OF STOCK.

BUDD v. MULTNOMAH STREET R. CO *

Supreme Court of Oregon, May 13, 1885.

TROVER.—Shares of stock in a corporation are personal property, and an action for conversion will lie for their misappropriation.

Appeal from Multnomah county. The opinion states the facts.

* S. C., 6 West Coast Repr. 668.

H. T Bingham and *J. C. Bower*, for the appellant; *D. W. Welty* and *J. C. Moreland*, for the respondent.

LORD, J., delivered the opinion of the court:

This is an appeal from a judgment upon demurrer. The action was in trover for the conversion of certain shares of the capital stock of the corporation defendant. The complaint in substance alleges that the plaintiff was the owner of one hundred shares of the capital stock of said corporation defendant, of the value of ten thousand five hundred dollars, and that the defendant wrongfully took possession of said shares, and disposed of and converted the same to their own use. The demurrer to the complaint was sustained upon the ground that trover would not lie for the conversion of shares of stock.

The only question, therefore, presented by this record is: "Are shares of stock such personal property as an action for conversion will lie for their appropriation?" What is stock, or a share of stock? "A share in a corporation is a right to participate in the profits or in the final distribution of the corporate property *pro rata*." Field v. Pierce, 102 Mass. 261. "A share or interest in the capital stock of a bank, or other corporation, may be defined as the right to *pro rata* periodical dividend of all profits, and, if the corporation is not immortal, a right to a *pro rata* distribution of all its effects on the death." People v. Commissioners, etc. 40 Barb. 353. "Shares of stock are generally considered to be personal property;" Bouvier's Law Dic. "Stocks;" and by our statute are to be deemed personal property, and subject to attachment, execution, levy and sale, as such. Misc. Laws, chap. 7, § 13. They are not "chattels personal, susceptible of possession actual or constructive." Arnold v. Ruggles, 1 R. I. 165. "But they are," says Shaw, C. J., "if not choses in action, in the nature of choses in action, and what is more important, they are personal property." Hutchins *v.* State Bank, 12Metc. 421.

Of the nature of shares, and the right or interest in them considered as such, Durfee, C. J., said: "Does the term share denote a thing in possession, or does it denote the mere right to a thing not in possession, but in action, and therefore subject to be claimed or demanded? We have shown that a right to a vote as a member of the corporation, and a right to the dividends of the profits of the concern, make all the beneficial interest that is called a share. But these rights subsist only in law or in contract. The individual invested with them has them *in presenti*, and in virtue thereof, claims things that are not at any time all present, uniting possession with right, for all votes save one, and all dividends, save one, must always exist *in futuro*—a chose not in possession—a thing subject to be demanded, money payable at a future day. A share then, is a mere ideal thing—it is no portion of matter, it is not susceptible of tangible and visible possession, actual or constructive. Yet, in common parlance, we say that a

man is possessed of a right and it is a sufficiently intelligible mode of speaking; but then the meaning of the term possession must be understood to be modified by the object to which it relates, if a right be an ideal thing merely, or something existing but in law or contract the possession must be ideal—subsisting from law or contract. To be possessed of a share, therefore, is to be invested with the rights which constitute it, to pass in and succeed to the station, relation and powers of the former shareholder, and to become a corporation in reference to the particular share. But it is quite evident that this cannot be accomplished but by actual transfer or by operation of law. This only can give, in common parlance, the possession of a mere right, or those rights denominated a share in a corporation."

Whenever, therefore, these things are done, or happen, whether by means of contracts or by operation of law, by which an individual is invested with those rights which constitute a share in the stock of a corportion, he is, so to speak, possessed of such share, the owner of it. It is not the certificate which confers the right to, or ownership of the share, nor is it the stock itself, but only the paper evidence of the right or title to the share which may be used for the purpose of symbolical delivery, as the share itself, being intangible, is not susceptible of actual delivery. As thus evinced, the certificate is the written expression of the legal existence of such share, giving to that which is intangible a tangible representation, by which, as a convenient method, it may be sold, transferred, or speculated in as other personal property. A share then exists in legal contemplation, and is personal property which may be dealt with, enjoyed, and subjected to judicial process as such; and of which the certificate is not the property itself, but only documentary evidence of title to it. Being thus impressed by law with the attributes of personal property, recognized as such, capable of being enjoyed, dealt with and subjected to judicial process, it would seem to follow that whenever there has been some repudiation by the defendant of the owner's right to the share, or some exercise of dominion or control over it, inconsistent with such right, he is guilty of a conversion, and ought to be held liable in trover.

A conversion is defined to be "a wrong, consisting in dealing with the property of another as if it were one's own, without right:" Abbott's Law Dic. "Conversion," Judge Cooley defines to be: "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is conversion:" Cooley on Torts, 448. Mr. Bigelow says: "It may be laid down as a general principle that the assertion of title to, or an act of dominion over, personal property, inconsistent with the right of the owner, is a conversion." Bigelow's Leading Cases, 428. Nor is it necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use. "Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights. If he does, that is in law a conversion, be it for his own or another's use." Bacon's Abridgment, "Trover." The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of conversion. Ramsby v. Beezely, 11 Or. 51.

But the defendant contends that a share of stock being intangible, is incapable of being taken and wrongfully converted to the use of another; and, as a consequence, that the allegation that the defendant wrongfully took, disposed of, and converted the said shares to their own use, is the statement of an impossible fact, and tenders no issue. In support of this position, Sewell v. Bank of Lancaster, 17 S. & R., 285, and Miller v. Kelly, 30 Pa. St. 407 are cited and relied upon. In the latter of these cases, Sharswood, J., said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of the corporation—never realized except upon the dissolution, and winding up of the corporation—with the right to receive, in the meantime, such profit as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm."

As based upon the common law fiction of property lost and found in actions of trover which prevails in that State, and which lay only for tangible property capable of being identified and taken into actual possession, the correctness of the decision is not questioned. "But," as was said by Parke, C. J., "what matters it whether the thing itself is capable of being taken into hand and carried away, so long as it is personal property of as substantial value as any other; and in no case can the thing itself be recovered in this form of action, but only its value. There was force in the claim originally, when trover was confined to property lost. From the nature of the action it could not then lie unless the property was tangible. The fiction of lost property is still retained in declarations of this kind, but the allegation has long since ceased to be substantial and there is no longer any reason for requiring that the property should be tangible. * * * If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted—that the conversion of the paper constituted the entire wrong. The real act done in such cases is precisely the same as done here, no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. Conversion is the gist of the action of trover. Everywhere it is so held. The

stock in both cases was converted; and we think in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained." In Paine v. Elliott, 54 Cal. 304, in an able opinion by McKee, J., it was held in an action for the conversion of shares of stock of a corporation, that "it is the shares of stock" which constitute the property, and not the certificate; and that an action is maintainable for the conversion of the share of stock which the certificate represents as well as that of the certificate.

In McAllister v. Kuhn, 96 U. S. 87, the identical objection was made which is raised here. There the judgment had been taken by default, and confessed whatever had been properly pleaded, as the demurrer here admits. In that case Waite, C. J., said: "If the statements contained in the petition are true. and McAllister had actually converted the stock to his own use, Kuhn was entitled to damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but for purposes of pleading, the ultimate fact to be proved need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action."

Under our system, the technical difficulty which embarrassed the common law action for trover, and made it only applicable for the conversion of tangible property, no longer exists, and the action may be maintained for the conversion of every species of personal property. We think the complaint states the necessary facts to constitute a cause of action. The demurrer is not well taken and the judgment must be reversed.

NOTE.— *Trover against Corporations.* — When it was first sought to use the action of trover against corporations, it was objected that they could not be sued in their corporate character for torts, and that the action must be brought against each person who committed the tort by name.[1] But the liability of corporations for torts generally, and including trover,[2] is now well established.

—— *for Stock.*—The next point made was that the action of trover lies only for property that is tangible, and which will admit of being taken into actual possession. The older authorities sanction this idea, and such may be said to have been the common law,[3] but as remarked by Parke, C. J.: "There is really no difference in any important respect between shares of stock and other kinds of personal property. A man purchases a share of stock and pays $100 for it; he afterwards purchases a horse and pays the same price. The one was bought in the market as readily as the other, and can be sold and delivered as readily; the one can be pledged as collateral security as easily as the other, as easily attached to secure a debt, and its value as easily estimated; the one enriches a man as much as the other, and fills as important a place in the inventory of his estate. It is considered personal property, as substantial as the other, both in law and the transactions of men. It is, therefore, as great a moral wrong for a man to convert the one to his own use as it would be the other, and it ought to be as great a legal wrong."[4] However, therefore, it may have been at common law, the action of trover has now almost universally been developed into a remedy for the conversion of every species of personal property, including shares of stock.[5]

Instances of the use of the action of trover as a remedy for the conversion of stock are, amongst others, the following:

Where stock is put up as collateral security for a debt which is subsequently paid, and, after payment, the pledgee fraudulently sells the stock, he will be liable for the value of the shares and dividends, and interest in an action of trover.[6]

A held stock of B as collateral security for a debt of B. He sold the stock without authority, and appropriated the proceeds to his own use. B then demanded the stock, and offered to pay his debt, but did not tender any money. A, without objecting that money was not tendered, refused the demand on the pretense that he had a right to hold the stock in pledge for the debt of the third person. *Held*, that B might recover from A the market value of the stock on the day of the demand, with interest, less the amount of his debt, without any further demand or tender.[7]

Where the defendant stockbrokers at the request of the plaintiff and for him, but in their own names and with their own funds purchased certain stocks, he depositing with them a margin of ten per cent. which was to be kept good, they carrying the stocks for him, it was *held*, that the legal relation created between the parties by this transaction was necessarily that of pledgor and pledgee, the stock purchased being the property of the plaintiff, and in effect pledged to the defendants as security for the repayment of the advances made by them in the purchase, and that a sale of such stock by them, except upon judicial proceedings or after a demand upon him for the repayment of such advances and commissions, and a reasonable personal notice to him of their intention to make such sale in case of default in payment, specifying the time and place of sale, was a wrongful conversion by them of the property of the plaintiff.[8]

1 1 Kyd, 225; Bac. Abr. Corp. E. 2, 5.

2 Beach v. Fulton Bank, 7 Cowen, 485; Brown v. So. Kennebec, Ag. Soc. 47 Me. 275; Yarborough v. Bank of England, 16 East, 6.

3 See Payne v. Elliott, 54 Cal. 339; Ayres v. French, 41 Conn. 150; Kuhn v. McAllister, 1 Utah, 273.

4 Ayers v. French, 41 Conn. 50.

5 Payne v. Elliott, 54 Colo. 339; Maryland Fire Ins. Co. v. Dalrimple. 25 Md. 242; Cousland v. Davis, 4 Bosworth, 619; Freeman v. Harwood, 49 Me. 195; Monk v. Graham, 8 Modern R. 9; Markham v. Jandon, 41 N. Y. 235; Baker v. Drake, 66 N. Y. 518; Ayers v. French, 41 Conn. 150; Baker v. Wasson, 53 Texas, 156; Baird v. Farmers & M. Bank, 52 Pa. State, 234; Pratt v. Taunton, Mfg. Copper Co., 123 Mass. 112; Salisbury Mills v. Atkinson, 109 Mass. 121; Small v. Boston Water Power Co., 4 Allen, 277; Bridgeport Bank v. N. Y. & N. H. R. R. Co., 30 Conn. 232; Bank v. Lanier, 11 Wallace, 373; Cushman v. Faif Mfg. Co., 76 N. Y. 368; Seymour v. Ives, 46 Conn. 109; *In re* Shipley, 10 Johns. 484; Kuhn v. McAllister, 1 Utah, 273; Boylan v. Hagnal, 8 Nev. 352; Fisher v. Brown, 104 Mass. 259; Baker v. Wasson, 59 Tex. 141.

6 Freeman v. Harwood, 49 Me. 195.

7 Fisher v. Brown, 104, Mass. 259.

8 Markam v. Jauden, 41 N. Y. 235. See also Baker v. Drake, 66 N. Y. 518.

But one of several stockholders cannot back out of an agreement which all have entered into to contribute a number of shares each to be sold for the benefit of the corporation, after the rest, in reliance upon the agreement, have contributed their proportion; and if his shares have been taken and used accordingly, he cannot bring trover for them.[9]

———. *Specific Delivery of Stock.*—The next point made was that damages recoverable at law by action of trover, were sufficient compensation for conversion of stock. It was decided that *mandamus* would not lie to compel the transfer of stock by a corporation,[10] and that the party was left to his special action on the case or trover to recover the value of the stock refused to be transferred.[11] But in many cases damages were not an adequate compensation. Take, for example, the conversion of stock especially valuable as an investment on account of reliable or extraordinary prospective profits to be realized thereon in the shape of dividends. Damages would not pay for the prospective profits lost. It is no reply to say that with the money paid as damages other shares of the same stock could be bought, for very likely if the stock be limited in quantity and if very desirable none of it can be obtained on the market. Considerations such as these have led to the establishment of an equitable remedy to compel the delivery of the stock converted or the issue of new stock, where practicable, in place of that converted.

Accordingly when the name of the owner of a certificate of stock had been forged to a blank form of transfer, and to a power of attorney indorsed on it, and the purchaser of the certificate in this form, using the forged power of attorney obtained a transfer of the stock on the books of the corporation, it was decided in a suit by the owner against the corporation, that he was entitled to a decree compelling it to replace the stock on its book in his name, issue a proper certificate to him and pay him the dividends received on the stock after its unauthorized transfer.[12]

Many other cases illustrate the rule that specific delivery of stock may be compelled; but if the duty to deliver the shares arises out of a contract, it must possess mutuality and be founded upon a valid consideration;[13] it must be independent, or if dependent upon another contract, the latter must be sufficiently performed to make execution of the former possible.[14] It must not be unconscionable or fraudulent.[15] It must be possible of enforcement,[16] and not be contrary to public policy.[17] The promisor must have had the stock at the time he contracted to convey it.[18] The remedy at law must be inadequate,[19] and as to adequacy of the remedy at law, a distinction exists between government and many railway stocks, they being readily purchasable on the exchanges and damages being an adequate remedy for their conversion,[20] and stock in private corporations which is not so readily obtained, and for the conversion of which damages are not an adequate compensation in all cases. Specific delivery of private stock may therefore be compelled.[21] Especially in cases of trust will the trustee be decreed to deliver the stock.[22]

But where delivery of the stock may be compelled, the injured person has his election of remedies. It is not for a wrong-doer to prescribe to him what his remedy shall be. After a conversion, the value of the stock might be so much diminished that new certificates would give no adequate compensation; or, in cases where shares have gone into the hands of innocent persons to require a new issue of the stock might involve an over issue which would be illegal. In such cases trover is the best remedy and indeed the only practicable one.

9 Conrad v. LaRue, Mich. 1883, 3 Am. & Eng. Corporation Cases, 204.

10 *In re* Shepley, 10 Johns. 484.

11 *Idem.*

12 Telegraph Co. v. Davenport, 97 U. S. 369. See also Pratt v. Taunton Cop. Mfg. Co. 123 Mass. 110; Blaisdell v. Bohr, 68 Ga. 56; Mayor v. Ketchum, 57 Md. 30; Weaver v. Barden, 49 N. Y. 287; Sewall v. Bost. W. Pow. Co., 4 Allen, 277; Chew v. Bank of Baltimore, 14 Md. 299; Brown v. Howard Ins. Co., 42 Md. 384; Pollack v. National Bank, 7 N. Y. 274: Hildyard v. South Tea Co., 2 P. Wms. 76; Cottam v. East Co.s Ry. Co., 1 J. & H. 243; Johnson v. Renton, L. R. Eq. 181; Hambleton v. Cent. Ohio R. R. Co., 44 Md. 551; Johnson v. Kirby, California, 1884.

13 Oriental Inland Steam Co. Lim. v. Briggs, 2 John & Hem. 625; Cheale v. Kenward, 3 De G. & J. 27; Strasburg R. Co. v. Echtermacht, 21 Pa. St. 221.

14 Burton v. Shotwell, 13 Bush. (Ky.) 272. See also Leach v. Forbes, 11 Gray, 506; Biesell v. Bank, 5 McLean, 505.

15 R. R. Co. v. Cromwell. 91 U. S. 645; Odessa Trans. Co. v. Mendel, 37 L. T. N. S. 275.

16 On this point see Brunswick etc. Co. v. Muggeridge, 4 Drew 686; Hercy v. Birch, 9 Ves. 357; Sheffield Gas Co. v. Harrison, 17 Beav. 294; Ross v. U. P. R. R. Co., 1 Woolw. 26; Danforth v. P. & O. M. R. Co., 30 N. J. Eq. 12; Fallon v. R. Co., 1 Dill. 121; Ferguson v. Wilson, 2 Ch. App. 87.

17 Foll's Appeal, 91 Pa. St. 434. See, however, Moffatt v. Farquhar L. R. 7 Ch. Div. 591; Wilson v. Keating, 4 DeG. & J. 588.

18 Cud v. Rutter, 5 Vin. Abr. 540.

19 Cappur v. Harris, Bunbury, 135; Cud v. Rutter, 5 Vin. Abr. 540; 1 P. Wms. 570.

20 See Ross v. U. P. R Co., 1 Woolw. 26; Ashe v. Johnson, 2 Jones Eq. 149; Duncuft v. Albrecht, 12 Sim. 189; Doloret v. Rothschild, 1 Sim. & Stu; Gardner v. Pullen, 2 Vern. 393.

21 Treasurer v. Commercial Mining Co. 23 Cal. 390; True v. Houghton, 4 Leg. Adv. 108 (Colorado); Cushman v. Thayer Mfg. Co., 76 N. Y. 368; White v. Schuyler, 1 Abb. Pr. (N. S.) 300; 31 How. Pr. 38; Purchase v. N. Y. Ex. Bank, 3 Robt. 164; Johnson v. R. R. Co., 54 N. Y. 416; Chater v. S. F. S. R. Co., 19 Cal. 219; Colt v. Netterville, 2 P. Wms. 304; Hardenbergh v. Bacon, 33 Cal. 356; Todd v. Taft, 89 Mass. 371; Paine v. Hutchinson, L. R. 3 Ch. 388; Shaw v. Fisher, 2 DeG. & Sm. 11; Wynne v. Price, 3 DeG. & Sm. 310; Walker v. Bartlett, 18 C. B. 845; Withey v. Cattle, 1 Sim. & Stu. 172. But see Ferguson v. Paschall, 11 Mo. 287; Noyes v. Marsh, 123 Mass. 286; Dorison v. Westbrook, 5 Vin. Abr. 540; Jones v. Newhall, 115 Mass. 244.

22 Cowles v. Whitman, 10 Conn. 123; Johnson v. Brooks, 46 N. Y. Sup. Ct. 13; Draper v. Stone, 71 Me. 175; see also Forest v. Elwes, 4 Ves. 497; Tyfe v. Swaby, 16 Jur. 49; Stanton v. Percival, 5 H. L. Cas. 257; Wonson v. Fenno, 129 Mass. 405.

MUNICIPAL CORPORATIONS — REASONABLENESS OF ORDINANCES.

TOWN OF STATE CENTER v. BARENSTIEN.*

Supreme Court of Iowa, June 3, 1885.

MUNICIPAL CORPORATION. [*Ordinances.*] — *Ordinance Fixing Peddler's License, when Unreasonable and Void.*—An ordinance of a town, providing that a person engaged in peddling goods from house to house, "shall pay not less than one nor more than twenty-five dollars, for a fixed time, in the discretion of the mayor," is unreasonable and void.

Appeal from Marshall district court.

The defendant was convicted of a misdemeanor in violating an ordinance of the town of State

*S. C., 23 N. W. Repr. 652.

Center, and was adjudged to pay a fine of $25. From the judgment he appeals to this court.

Parker & Childs for appellant; *Frank Walker* and *James Allison* for appellee.

ADAMS, J., delivered the opinion of the court:

The defendant was charged with peddling goods from house to house on the streets of State Center without first procuring a license therefor, contrary to the ordinances in such case made and provided. The defendant admits that he peddled goods as charged, and without procuring a license as provided by the ordinances of the town, but he contends that the ordinances have no validity for the reason that the same are unreasonable and unauthorized. It is not necessary to set out the ordinances in full. It is sufficient to say that provision is made for licensing certain occupations, and, among them, selling goods at retail from house to house. And it is provided that a person engaged in such occupation "shall pay not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor." The power to regulate and license peddlers is unquestioned. It is expressly conferred by section 463 of the Code. But the power can be exercised only under an ordinance, and if an ordinance is passed for such a purpose, and is such that a court must, upon mere examination of its terms, declare it unreasonable, it is void. Dill. Mun. Corp. § 254. Commissioners v. Gas. Co. 12 Pa. St. 318. The ordinance in this case is a very peculiar one. It not only did not fix the amount or the license, but it did not, in any proper sense, limit it. The limitation of $25 has no significance because the time for which the sum might be charged was left wholly to the mayor, and he might fix so short a time as to be equivalent to a refusal to license at all. This, we think, was not a proper exercise of the power vested in the council to regulate and license peddlers. It was more in the nature of a delegation os their whole power to the mayor. In our opinion the ordinance cannot be sustained.

Reversed.

NOTE.— *Reasonableness of Ordinances* —The two leading rules which determine the province of the courts on this subject have the appearance of being contradictory, and, from the misapplication of them, much conflict of authority has arisen.

It is well settled that where a power is conferred upon a municipal body, without particular directions as to the manner of executing it, a discretion is thereby given; and that discretion within the lines of the power is legislative, and not open to review by the courts. If the power granted has been exceeded or private rights invaded the courts will afford a remedy; but otherwise they will not be at liberty to substitute their judgment for the judgment of the donee of the power, on the score that the municipal body has acted unwisely. 1 Dill. Mun. Corp., § 328; State v. Clark, 54 Mo. 17; Gas Co. v. Des Moines, 44 Iowa, 509; St. Louis v. Boffinger, 19 Mo. 15.

On the other hand, it is equally well settled that the discretion given by such powers is limited to the choice of reasonable means. 1 Dillon Mun. Corp., § 328. In such case the ordinance will not be void, because unreasonable, but, being unreasonable, it is *ultra vires*, unless the power is clearly given. *Ex parte* Chin Yan, 60 Cal. 78; Dunham v. Trustees, 5 Cow. 466. In the interpretation of powers it will not be presumed that authority is given to enact laws which unnecessarily and unreasonably restrict private rights. Neeman v. Smith, 50 Mo. 525. Whether the means or manner prescribed by the by-law are reasonable, being a question of power, is to be determined by the courts. 1 Dillon Munc. Corp., § 327; Corrigan v. Gage, 68 Mo. 541; Robinson v. Mayor, 34 Am. Dec. 633, note; s. c., 1 Humph. 156. Judge Dillon is of opinion that evidence to the jury is not admissible, and seems to hold that the question is to be determined by the court from the face of the ordinance. Dillon Munc. Corp., § 327. But when it is conceded, as it must, that the question as to reasonableness is to be determined from locality and other circumstance (see note to Robinson v. Mayor, *supra*; Corrigan v. Gage, 68 Mo. 541; Com. v. Patch, 97 Mass. 222; St. Louis v. Weber, 44 Mo. 547; Naffman v. People, 19 Mich. 352), it would seem to follow that the question reaches beyond the domain of legal judgment; it becomes one of fact, which under our system separating law from fact, should be submitted to the jury under instructions as in ordinary cases. Clason v. Milwaukee, 30 Wis. 316. Though the question is not legislative, but judicial, a presumption will be indulged in favor of the ordinance, and its unreasonableness must therefore be made to appear. St. Louis v. Weber, 44 Mo. 547; Com. v. Patch, 97 Mass. 222.

In determining whether reasonable or not examination must first be made of the purpose of the power pretended to have been exercised. Powers are conferred upon corporations to accomplish the objects of its creation and their exercise must be confined thereto: Ang. & Ames Corp. 268; 2 Kent Com. 296; People v. Med. Soc. 24 Barb. 275. The by-law must tend in some degree to accomplish those objects, Cooley Const. Lim. 243: Bloomington v. Wahl, 46 Ill. 490, without "interfering with the liberty, property or business of the citizens more than is requisite to secure the lawful and proper objects in view." Com. v. Patch, 97 Mass. 223. If the by-law should prohibit that which is harmless in itself, or command to be done that which does not tend to promote public health, safety or welfare, it will be the duty of the courts to declare it void. R. v. Jacksonville, 67 Ills. 40; St. Louis v. Weber, 44 Mo. 550; State v. Fisher, 52 Mo. 174.

Unreasonable.— Thus, an oppressive interference with personal liberty; by directing the arrest and detention of free negroes found on the street at night, is void: Mayor v. Winfield, 8 Humph.)707; prohibiting association with gamblers, prostitutes and thieves, unless to aid them, is void: St. Louis v. Fitz, 53 Mo. 582. So, also, imposing useless and onerous restrictions upon private business or rights; by requiring druggists to report under oath sales of liquor, the quantities and to whom sold: Clinton v. Phillips, 58 Ills. 102; requiring license for sales of lemonade at temporary stands: Barling v. West, 29 Wis. 307; St. Paul v. Traeger, 25 Minn. 248; providing for attendance of constable at theatrical exhibitions, and to pay him certain fees for attendance: Waters v. Leach, 3 Ark. 110; forbidding auctioneers from selling save to the highest bidder: *In re* Martin, 27 Ark. 467; compelling owner to remove or destroy property not shown to be a nuisance: Baltimone v. Redecke, 49 Md. 217; Pieri v. Mayor, 42 Miss. 493; prohibiting auctioneers from selling at night: Hayes v. Appleton, 24 Wis. 542; but see Plattsville v. Bell, 43 Wis. 488; State v. Knoxville, Head, 245; State v. Welch, 36 Conn. 215; requiring burial of dead at one place, the prohibited territory being unreasonably

large: Selectmen v. Murray, 16 Pick. 121; but see Charleston v. Baptist Church, 4 Strob. L. 306; subjecting private burial grounds to control of city sexton: Bogart v. Indianapolis, 13 Ind. 134; requiring railroad company to station flagman at unfrequented point: R. R. v. Jacksonville, 67 Ills. 38; subjecting private property to useless expense for street improvements without advantage to public: Corrigan v. Gage, 68 Mo. 541; requiring city sexton whose fees were paid by private persons to expend a certain sum of money on burial grounds, and to bury paupers without charge: Beronjohn v. Mobile, 27 Ala. 58; prohibiting the renting of houses or rooms to prostitutes, without regard to the use to ds to deprive them of habitation and is void. Mullikin v. Council of Weatherford, 54 Tex. 389; see, also, Welch v. Stowell, 2 Doug. (Mich.) 332.

Reasonable.—Regulations are reasonable which tend to secure public health by prohibiting the adulteration of milk: Palinsky v. People, 73 N. Y. 65; but see and compare, People v. Manx, 21 Cent. L. J. 24; State v. Addington, 12 Mo. App. 214; S. C., 77 Mo. 110, affirmed. So, also, regulations of sale of milk: People v. Mulholland, 82 N. Y. 324; prohibiting slaughter of animals beyond certain district: Slaughter House Cases, 16 Wall. 63; *Ex parte* Hieboon, 20 Cent. L. J. 183; S. C., 4 Pac. Rep. 648; compare Ureford v. People, 14 Mich. 41; prohibiting the keeping of swine, or allowing cattle to run at large: Com. v. Patch, 97 Mass. 221; Com. v. Bean, 14 Gray, 52; fixing market hours, and prohibiting sale of meat at other times or places. Bowling Green v. Carson, 10 Bush. (Ky.) 164; St. Louis v. Weber, 44 Mo. 547; providing for weight and price of bread: Mayor v. Yuille, 3 Ala. 137; requiring permission to occupy market stands: Nightengale, Petitioner, 11 Pick. 168; forbidding sales of merchandise on Sunday is a regulation of public health and order: St. Louis v. Caffarata, 24 Mo. 94; Gabel v. Houston, 29 Tex. 335. So also regulations which tend to secure public order, convenience and welfare by requiring saloons to close at nine P. M. State v. Welch, 36 Conn. 215; requiring restaurants to close at ten P. M. State v. Freeman, 38 N. J. L. 426; requiring draw-bridges across a river to be closed every ten minutes to admit travel: Chicago v. McGinn, 51 Ill. 226; prohibiting awnings: Pedrick v. Bailey, 12 Gray, 161; forbidding wagons with perishable produce to remain in market place between certain hours longer than twenty minutes: Com. v. Brooks, 109 Mass. 355; prohibiting coaches from standing nearer than thirty-five feet from entrance to places of amusement: Com. v. Robertson, 5 Cush. 438; prohibiting trains from standing across street longer than two minutes: State v. Jersey City, 37 N. J. L. 348; excluding omnibuses from certain streets: Com. v. Stodder, 2 Cush. 562; assigning stands for coaches: Com. v. Mathews, 122 Mass. 60; regulating fares: Com. v. Gage, 114 Mass. 328; imposing penalty for obstructing street car: State v. Foley, 31 Iowa, 527. Regulations tending to secure public safety, reasonable, by fixing rate of speed of trains and wagons: Com. v. Worcester, 3 Pick. 461; Penn. Co. v. James, 32 P. F. Smith (81 and 1-2 Penn. St.) 202; requiring railroad to station flagman at crossings: Delaware etc. v. East Orange, 41 N. J. L. 127; requiring side-walks cleaned of snow: Goddard, Petitioner, 16 Pick. 504; *contra* Grindley v. Bloomington, 88 Ill. 555; regulating keeping of gunpowder: Williams v. Augusta, 4 Ga. 509; prohibiting removal of sand from lake front: Clason v. Milwaukee, 30 Wis. 316; prohibiting gambling and bawdy houses within certain districts: *Ex parte* Chin Yan, 60 Cal. 78; prohibiting work in public laundries at night in certain districts: Soon Hing v. Crowley, 5 Sup. Ct. Rept. (U. S. S. C.); S. C., 20 Cent. L. J. 730; Barbier v. Connelly, 113 U. S. 27; Establishing fire limits: King v. Davenport, 98 Ill. 305; prohibiting building of wooden building in certain district: Bumgartner v. Hasty, Sup. Ct. Ind. 1885, 20 Cent. L. J. 74; requiring building license: Welch v. Hotchkiss, 39 Conn. 140; prohibiting the hauling of dirt through streets without license; Vandine, Petitioner, 6 Pick. 186; requiring license for vehicles: St. Louis v. Green, 70 Mo. 562; requiring license to stand on street to sell papers: Com. v. Elliott, 121 Mass. 367; vesting discretion in certain officer to refuse license: People v. Mulholland, 82 N. Y. 324; St. Louis v. Knox, 6 Mo. Appl. 247—(but *quære*). See further instances of reasonable and unreasonable ordinances: note to Ward v. Mayor of Greenville, 35 Am. Rep. 702; note to Robinson v. Mayor of Franklin, 34 Am. Dec. 627; note to Cooley Const. Lim. 201.

A discretion delegated to municipal legislature cannot be delegated by it: St. Louis v. Clemens, 52 Mo 133; Thomson v. Boonville, 61 Mo. 282.

Ordinances must be consistent with the legislative policy of the State, and not in conflict with the charter or statutes: 1 Dillon Mun. Corp. §§ 319, 329; Robinson v. Mayor of Franklin, *supra*; Ward v. Greenville, 8 Baxter, 228; S. C., 35 Am. Rep. 702; they must be certain: McConville v. Jersey City, 39 N. J. L. 42; Huntsville v. Phelps, 27 Ala. 55; must not contravene common right, or be contrary to fundamental principles of common law, unless clearly authorized: Evansville v. Martin, 41 Ind. 145; St. Charles v. Nollee, 51 Mo. 122; 1 Dillon Mun. Corp. § 324. As to distinction between license as regulation, and for purposes of revenue see: State v. Hoboken, 33 N. J. L. 280; Youngblood v. Sexton, 32 Mich. 406; *In re* Wan Yin, 22 Fed. Rep. 701; S. C., 20 Cent. L. J. 257.

WEEKLY DIGEST OF RECENT CASES.

EVIDENCE. [*Value.*] *Evidence of Particular Sales of Land not Admissible to Establish Market Value.*—In a proceeding to condemn land for a railway, evidence of sales of similar property is not admissible to establish its market value. [In the opinion of the court by Clark, J., it is said: "It is well settled, by numerous decisions of this court, that the proper measure of damages for lands taken for railroad purposes is the difference between the market value of the land before and after the appropriation of the right of way; and it seems to be equally well settled, under the law of this State, that evidence of particular sales of alleged similar properties, under special circumstances, is inadmissible to establish market value: Searle v. Lackawanna Railroad Co., 9 Casey, 57; Railroad Co. v Heister, 4 Wright, 53; Railroad Co. v. Rose, 24 P. F. Smith, 362; Hays v. Briggs, 24 P. F. Smith, 373; Vanderslice v. City of Philadelphia, 29 Pittsburgh Legal Journal, 433. The cases cited determine the question here raised so directly, that any extended discussion of it here would be a mere repetition of what is there fully stated. The selling price of lands in the neighborhood at the time is undoubtedly a test of value, but it is the general selling price, not the price paid for particular property.

The location of the land, its uses and products and the general selling price in the vicinity, are the data from which a jury may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well informed and reasonable men will approve, is the market value. A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly; if it be given in evidence it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the sales. The offer was to show particular sales, made about the time of the location of the railroad and since, of properties alleged to possess similar qualities and equal facilities as landings. The consideration of each of such sales, therefore involved necessarily, not only the collateral issues already stated but also a comparison of these various properties with that in question, as well as with each other. Such a course of examination must inevitably lead rather to the confusion than to the enlightenment of the jury, on the single matter for consideration. The introduction of evidence of particular sales is therefore not allowable under our decisions to establish market value." The following cases were cited by counsel in favor of the opposing view: Paine v. City of Boston, 4 Allen, 168; Boston & Wor. R. v. Fall River R., 3 Id. 146; Benham v. Dunbar, 103 Mass. 365; Wyman v. Land, W. C. R. 13 Metcalf, 326; Concord R. v. Greely, 23 N. H. 242; March v. Portsmouth & C. R., 19 Id. 376; King v. Iowa Midland R., 34 Iowa, 461.] *Pittsburgh etc. R. Co. v. Patterson*, S. C. Pa., Jan. 19, 1885; 15 Pittsb. Leg. Jour. (N. S.) 257.

2. HABEAS CORPUS. [*Irregularity.*] *Prisoner not Discharged because of Irregularity in Warrant.*—If upon the hearing of a writ of *habeas corpus* the court or judge is satisfied that the offense, for which the prisoner was held, was committed within the jurisdiction of the court, the prisoner should not be discharged, although the process, on which he was arrested and committed, was informal and not in compliance with the law. [The court cite: Rex v. Mark, 3 East. 157; *Ex parte* Keans, 1 B. & C. 258; Susannah Scott, 9 B. & C. 446; State v. Brewster, 7 Vt. 118; United States v. Lawrence, 13 Blatch. 306; People v. Rowe, 4 Parker C. R., 253; *State v. Plant*, 25 W. Va. 119 (Adv. Sheets).

3. HOMESTEAD. [*Abandonment.*) *Temporary Absence with Intent to Return not Abandonment.*—The occupants of a homestead have the same right to travel and sojourn in other places for temporary purposes of health, business or pleasure that other citizens have; and so long as such privilege is exercised in good faith, within reasonable limits, without intention to change or abandon the house, but with the fixed and certain intention of returning thereto, the homestead exemption is not affected thereby. *Busch v. Mouton*, S.C.La., Opelousas, July, 1885.

4. ——. [*Estate.*]—*Dowress and Remainderman not both Entitled to.*—A dowress and remainderman are not *both* entitled to homestead in the same land. [The court, by Lewis, J., say: "In the case of Robinson v. Smithy, 4 Ky. Law Rep. 542; 80 Ky. 636, it was held that a widow holding a life estate in land devised by her husband, with remainder to her children, and in the occupancy of the land was entitled to a homestead as against her creditors. Whether the widow in this case claims a life estate under the deed or not, as she was in possession at the death of her husband and never parted with her right, she was clearly entitled to the use of the one thousand dollars set apart in lieu of her homestead. But both she and D. B. Merrifield cannot have a homestead in the land. It was decided in the case of Maguire, Helm & Co. v. Burr, 4 Ky. Law Rep. 659, that joint owners of a tract of land, upon which they both live in separate buildings with their families, are each entitled to a homestead, although the land has not been divided. But this court has never gone so far as to determine that both the widow and remainderman can at the same time have a homestead in the same land, nor do we think the statute can be so applied and extended. The theory of the homestead exemption is that the debtor requires a prescribed amount in value of land to be set apart for the support of himself and dependent family, but to accomplish such beneficient object he must have the right to occupy and use it, and hence it is an indispensable requisite that a party claiming the exemption must be in the possession. But a party having merely an interest in remainder is without any right to the possession, and in the meaning of the law not in possession."] *Merrifield v. Merrifield*, Ky. Ct. of App., Jan. 22, 1885; 6 Ky. Law Repr. 568.

5. ——. [*Mortgage.*]—*Mortgage of, not Validated by Subsequent Abandonment.*—A, living with his wife and children on his homestead, executed a mortgage thereon to B, in which his wife did not join. Subsequently they abandoned their homestead, and after abandonment joined in two mortgages on the property to C and D, respectively. *Held*, that the mortgage to B did not become valid by the subsequent abandonment of the homestead. [In the opinion of the court by Rothrock, J., it is said: "It is provided by section 1990 of the Code, in reference to homesteads, that 'a conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument.' The question is, did Bruner's mortgage become valid by the subsequent abandonment of the homestead? We think not. By the very terms of the statute the mortgagee acquired no right by reason of the mortgage. It is true that when both husband and wife join in the same conveyance of the homestead, and the conveyance is void by reason of defects therein, such conveyance may afterwards be ratified by the acts and conduct of the parties. Spafford v. Warren, 47 Iowa, 47. But in this case there was no joinder of the husband and wife in the mortgage; and, even if it should be held that the wife could ratify a mortgage which she never executed, there is no evidence that the wife in this case ratified the act of her husband in executing the mortgage. See Alexander v. Vennum, 61 Iowa, 160; s. c., 16 N. W. Rep. 80."] *Bruner v. Bateman*, S. C. Iowa, June 10, 1885; 24 N. W. Repr. 9.

6. ——. [*Partition.*]—*Sale of that Portion of a Dwelling-House used for Business Purposes—Horizontal Partition of Realty.*—The cellar and the first and fourth stories of the building claimed by defendant as his homestead, and the two sheds in the rear thereof, having been used by him for business purposes, *held* subject to sale for satisfaction of judgment against him. [In the opinion of the court by Reed, J., it is said: "These facts bring the case within the doctrine of Rhodes v. McCor-

mack, 4 Iowa, 368, and Mayfield v. Maasden, 59 Iowa, 517; s. c., 13 N. W. Rep. 652. The first and fourth stories of the building, and the cellar (except that portion used by defendant for the storage of provisions and vegetables for the use of his family), and the two sheds in rear of the building, are subject to be sold for the satisfaction of plaintiff's judgment. These portions of the premises do not constitute any part of the homestead. They have been used and occupied by defendant as a place of business, and not as a place of residence for his family. They are not exempt under the the provisions of section 1997 of the Code, which exempts from judicial sale the shop or building appurtenant to the homestead which is occupied and used by the debtor in carrying on his ordinary business; for their value is greatly in excess of the amount which is exempted by that provision, and their sale will not unreasonably interfere with the use by defendant of those portions of the building which he occupies as a place of residence. The sale of those portions of the premises will carry the right to the use of the hatchways in the second and third floors, and the hoisting apparatus for gaining access to the fourth story, and it will be subject to the right of defendant to have access by the stairway from the first floor to the portion of the cellar used by him for family purposes."] *Johnson v. Moser*, S. C. Iowa, June 12, 1885; 24 N. W. Repr. 32.

7. PRACTICE. [*Chancery.*]—*Leave of Court to Enforce Personal Security after Foreclosure of Mortgage.*—While no proceedings can be taken at law upon the personal security to enforce payment of the deficiency on foreclosure of a mortgage without leave of the court in which the foreclosure was had, this rule properly applies only to remedies upon the personal securities given with the mortgage, or which are intended to be secured by it, and only to parties to such instruments, and to those who are liable thereon, or properly made parties to the chancery proceedings in the foreclosure suit. [The grounds of this ruling will appear from the following extract from the opinion of the court by Sherwood, J.: "Counsel for respondent rely upon paragraph 6703 of Howell's Statutes, to support the action taken by the judge of the superior court. It reads as follows: 'After such bill [meaning the foreclosure bill] shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law, for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.' This statute came to us from that adopted in the State of New York, and seems to be a copy of the same. Before the adoption of this statute no decree for a deficiency could be rendered in a foreclosure suit. Dunkley v. Van Buren, 3 Johns. Ch. 330. The court could only decree a sale of the mortgaged premises and the application of the proceeds to the debt secured by the mortgage. A separate suit at law upon the bond or note was necessary for the recovery of the deficiency, where one arose, and the creditor had the right to institute proceedings upon the personal security, even during the pending of the foreclosure suit. Jones v. Conde, 6 Johns. Ch. 78. The debtor was thus subjected to a 'double litigation,' and the object of the statute is said to have been in that State to abolish such oppressive proceedings and give to the court of equity power to afford complete relief in mortgage cases by awarding a decree for the deficiency, and permitting execution to go thereon, retaining, however, power in the court to allow a suit at law to be brought in exceptional cases, the general rule being that the creditor must elect in which tribunal he will take proceedings to collect his claim. Engle v. Underhill, 3 Edw. Ch. 250; Suydam v. Bartle, 9 Paige, 294; Insurance Soc. v. Stevens, 63 N. Y. 341; Scofield v. Doscher, 72 N. Y. 491. It seems to be very well settled also in New York that no proceeding can be taken at law upon the personal security, to enforce payment of the deficiency, without leave of the court in which the foreclosure was had; and this seems to be the tenor of the decisions in this State, so far as the question has come under review in this court. Glover v. Tuck, 24 Wend. 153; Porter v. Kingsbury, 5 Hun, 597, and cases above cited. Also Joslin v. Millspaugh, 27 Mich. 517; Innes v. Stewart, 36 Mich. 286; De Mill v. Port Huron Dry-dock Co., 30 Mich. 38. This rule, however, properly applies only to remedies upon the personal securities given with the mortgage, or which are intended to be secured by it, and only to parties to such instrument or instruments, and to those who are liable thereon or properly made parties to the chancery proceeding in the foreclosure suit."] *Culver v. Judge*, S. C. Mich., May 13, 1885; 23 N. W. Repr. 469.

8. RAILWAY COMPANY. [*Nuisance*]—*Must not Exercise its Statutory Powers so as to Commit a Nuisance.*—A railway company were, by their special Act, empowered to carry passengers, goods, and cattle, and other animals. They were also empowered to take lands compulsorily within a certain limit of time, and to purchase by agreement at any time additional lands, not exceeding in the whole fifty acres, for the purpose of station-yards, loading and unloading places, and other conveniences for receiving, loading or keeping any cattle, goods, or things conveyed, or intended to be conveyed upon their railway. They had also power from time to time to sell such last-mentioned lands, and purchase others in their stead. After the expiration of their compulsory powers the company acquired by agreement a piece of land, adjoining one of their stations, which they subsequently used as a cattle dock. The dock was used by them without negligence, but the noise of the cattle and the drovers was so great as to be a serious annoyance to the occupiers of houses in the neighborhood, and was admitted to amount to what would have been an actionable nuisance if committed by private individuals, and not in carrying out statutory powers. *Held*, that, as the company were not authorized to construct the cattle dock on any particular site, or at any particular time, and had not shown that a more eligible site could not have been obtained, they were not entitled to use the dock so as to cause a nuisance, and must be restrained by injunction from so doing. [The decision of North, J., 50 L. T. Rep. N. S, 89; 25 Ch. Div. 423, affirmed. Rex v. Pease, 4 B. & Ad. 30; Vaughan v. Taff Vale Railway Company, 2 L. T. Rep. N. S. 394; s. c. 5 H. & N. 679, and Hammersmith Railway Company v. Brand, 21 L. T. Rep. N. S. 238; s. c. L. Rep. 4 E. & I App. 171, distinguished.] *Truman v. London, etc., R. Co.*, English Court of Appeal, Feb. 1885; 52 L. T. (N. S.) 522.

9. TRIALS. [*Argument to Jury*] — *Duty of Court to Prevent Counsel from Travelling out of the Record.* — It is the duty of the court to prevent counsel from referring, in their argumentto the jury, to matters of evidence which

have been excluded. [In the opinion of the court, Champlin, J., said: "In his argument to the jury the plaintiff's counsel alluded to the defendant's character as developed in the divorce proceedings, when the defendant's counsel objected, inasmuch as they were ruled out of the case; whereupon the court said: 'The counsel must not allude to that record or what is in it. This is being repeated too often.' At which the plaintiff's counsel took exception to the interruption of the court. This exception of plaintiff's counsel was uncalled for. It was the duty of the court, on objection being made to counsel in his argument to the jury, commenting upon testimony which had been excluded, to admonish counsel not to comment upon testimony which had been excluded from their consideration, and are hence no doubt that he has sufficient power and authority to compel obedience to his order in that respect if necessary: and certainly if counsel in the heat of argument should so far forget themselves as to pass beyond the limits of propriety in that respect, they ought not consider it indecorous or misconduct in the court to call their attention to the fact."] *Hollywood v. Reed*, S. C. Mich., June 10, 1885; 23 N. W. Repr. 792.

CORRESPONDENCE.

A CRY FROM MACEDONIA.

To the Readers of the Central Law Journal.

It is to be most sincerely hoped that some of you who are profounder lawyers, more logical reasoners and more expert writers, "older in practice," than the common herd of us, will write for the LAW JOURNAL a leading article, or a series of them, on the subject of "Prohibition," considering it from all its standpoints, its possibility, that is its efficacy, its expediency, the financial question involved, the moral and the politico-legal aspect. When the anti-prohibitionist speaks of standing on the principle of "the personal liberty of the citizen," the prohibitionist quotes Blackstone that "Every man, when he enters into society, gives up a part of his natural liberty," and expresses the sentiment embodied in the letter of Lucien Shaw, Esq., 20 Cent. L. J. 459, that it depends only upon "a question of fact" whether or not prohibition ought to obtain, asserting that license laws, along with even our boasted Tennessee four-mile law, are tolerable only in that they infringe upon this "liberty." When the advocate of temperance says he abhors the evils of tippling, but that he does believe in the temperate use and enjoyment, and not abuse, of the things that God has given us, the total abstainer meets him with the text; "It is good neither to eat flesh, nor to drink wine, nor any thing whereby thy brother stumbleth, or is offended, or is made weak." Rom. 14 ch., v. 21. Therefore, in view of the magnitude of the question, you see I do well to ask you to "come over into Macedonia, and help us," by giving us light whereby we may reach the correct conclusion. TH.

P. S. *Vide* the present status of the city of Council Bluffs, Iowa, *passim*.

CRY NO. 2.

Indianapolis, July 3, 1885.

To the Editor of the Central Law Journal:

* * * You will have to resume and improve the system of writing briefs or texts of the live questions that are complete keys to the leading cases on the subjects respectively. ***

CRY NO. 3.

Lawrenceburgh, Ind., July 21, 1885.

To the Editor of the Central Law Journal:

I have been taking your LAW JOURNAL from July, 1877, and up to 1885, liked it better than any law journal I ever saw. But since January, 1885, I do not like it; and if the publication of the amount of matter entirely foreign to the subject of a law journal which has appeared this year is to be continued, I do not want to continue my subscription. If it is to be conducted as in former years, I do not want to do without it. I know of other subscribers who feel as I do about it. What we want in a law journal is law; and when I say as the CENTRAL was in former years, you have my idea of what we want more fully than I could otherwise express it. Hoping we may so get it, I am truly your friend, ***

CRY NO. 4.

Greenville, Tenn., July 20, 1885.

To the Editor of the Central Law Journal:

* * * [After giving some views on the subject of indexing.]

But I accompany the above with the further remark that the indexing of the abstracts or digests of cases is of little importance. These abstracts, or digests of cases, are just as useful to a *lawyer* as blank paper, *and no more so*. I have never cited one in my life, and can't remember that I ever saw it done, and Oh, you ought to hear us "cuss" when we have looked through the Index-Digest and found the point we have been looking for, and on turning to it, find it a digest in about the words of the index!! Then it's "blue." I wish there was not an abstract in my whole CENTRAL LAW JOURNAL, and I have it, in full. But I will be frank with you. This is my last year. I want more cases—more law for my money—and I can get it—ten to one. If you would drop the confounded digest or abstract department entirely, or cut it down to only a page or two, it would not be so bad.

But in the last few months—in fact it has been gradually growing on us for a year,—there is so much space taken up,—two or more pages of every number,—with "stuff" that I do not want to pay for; and I have not found one who did. Look at the last, "No. 3." Who wants such trash at $5.00 per year? And if the last numbers were not in the binder's hands (vol. 20), I'd point out more. But look at No. 1, (of vol. 21) "The Dakota Plan;" "Quick Way, etc.;" and No. 2, "Overcharges in Court Costs," and "Manitoba Exemption Law." Well, well, I want law, that's what I paid for.

Understand, others may want these things, (set up in large type, leaded, etc.,) but I do not. I want cases in full, with leading articles, in the type the JOURNAL formerly gave us. If I cannot get it here, I can somewhere else. I mean this in all kindness to you and your editor; but I say what I want, and what I hear others say they want. Yours, ***

P. S. For fear you may think I am captious, please do as I have just done,—turn back and compare the "matter" of the first three numbers of this current volume with some numbers of the years '75, '76, and '77. By taking the cases in the three numbers of this volume, and we will get less than sixty in the whole volume, or less than one hundred and twenty in the year. Think yourself the payor!! ***

REMARKS.—Brethren, do you remember the story of the old man, the boy and the ass; how the old man

tried to please everybody and pleased nobody, and killed his ass besides? We are publishing a law journal for all classes of the legal profession, in all parts of the Union. One wants one thing, and another wants another thing. The country lawyer of small income wants nothing but cases; or, at the most, cases and leading articles. The judge on the bench, the well-to-do lawyer in the large city, and the retired lawyer, want something besides mere cases, mere briefs or points, and merely technical articles. There is something in the law for him of a higher character, and he wants a journal that gives the news of the profession, and that discusses topics of law reform and jurisprudence, and other topics of interest to the legal profession. Our experience has shown us that in order to be successful, (and we have been successful),we must, as far as possible, meet the various wants of these various classes of readers. This was the view of the eminent judge and lawyer who was the founder of this JOURNAL, and this has been its policy from first to last. Its chief aim has always been and will continue to be *practical usefulness*—to furnish the weapons of war to the busy practitioner, and the means of solving doubtful questions to the overworked judge. This journal is in the hands of the one who edited its first volume, and who was its editor during the years 1875, 1876 and 1877, to which one of the above writers refers. It may be that he has lost some of his cunning; but from that time to this, his pen has been moving with unwearied diligence, and he certainly ought to have learned something in ten years—as much as some of the lawyers who favor him with their kind advice.

The above letters show how diverse the opinions of our readers are. Most of them want technical matter merely; but here is one of them—an able and useful member of one of our State legislatures—who wants us to open our columns to a long discussion of the prohibition question; which, of course, we cannot do. That is not a legal, but a political question. We have never expressed any opinion upon prohibition laws, one way or the other, except that they are not unconstitutional, and that it is the duty of the ministers of the law to enforce them where they prevail, not because they are good laws, but because it is their sworn duty.

Now, lest some other of our patrons should object that we are requiring them to pay their money for such matter as is contained in the above letters and in these comments, we would say that while we get many letters of commendation which we do not print, we print the above for a purpose immediately connected with the interest of our readers. That purpose is to draw their attention to the question of their real wants in connection with legal journalism, and to ask them to give us their views, not for publication, but in the greater freedom of private intercourse, as to the future policy of this journal. We have already indicated our purpose to enlarge it before the close of the present year, to increase its editorial force, and to make a greater expenditure of money in its practical departments; and the question is, on what departments could the expenditures be the most usefully made. Our learned correspondent from Tennessee is not in accord with the majority of our readers on the question of the usefulness of our Digest of Recent Decisions. Unless we deceive ourselves, that has always been a popular department of the JOURNAL, and it is by far the most laborious to the editor. Our experience has, however, inclined us to believe that a digest of mere points is not desired; but that what is desired is to make an abstract, or brief report, of the decision upon the particular point, stating the ruling which the court made, and giving a sufficient extract from the opinion to show the authorities and the reasons upon which the court proceeded. Our abstracts in the last two or three numbers, some of them a column in length, are really condensed reports. The language of the court is given without change or condensation, and can be quoted in court with just as much confidence as though the speaker held in his hand a full report of the decision. In this so-called digest, we take only cases which we deem to be of prime importance. We disencumber them of the matters of fact which surround them. We chisel out the important point only, and report the discussion of that, throwing all the rest away. In this manner, instead of reporting three cases in each number, as our friend complains, we more nearly report twenty; and instead of reporting 120 cases in a year, we more nearly report a thousand, and in a manner sufficiently full and ample for all practical purposes. If any of our readers desire more cases for $5 a year, merely cases because they are cases, we will frankly tell them where they can get them. They can get for that sum in the *Northwestern Reporter* a greater number—all the decisions of the Supreme Courts of Michigan, Wisconsin, Iowa, Minnesota, Nebraska and Dakota, shovelled together, the wheat and the chaff, every local and statutory question, and every foolish question which an unskilful lawyer may bring before a court of last resort, or cases appealed for the purpose of delay only, and on which the court is obliged by statute to render a written opinion. They can get nearly as much, and of a poorer quality, in the *Pacific Reporter;* and they will be able to get as much or more in the *North Eastern Reporter*, recently started, for the same money. But it will take a good deal of argument to convince us that we have not a higher office to fill in legal journalism than that of mere gatherers and printers of the raw and unassorted materials of jurisprudence.—ED. CENT. L. J.

JETSAM AND FLOTSAM.

A MAN OF CONVICTIONS.—John Adams enters in his diary, under date of June 25, 1771, that "Mr. Lowell, who practiced much in New Hampshire, gave me an account of many strange judgments of the Superior Court at Portsmouth." In those days, and for years after the Revolution, the judges made the law to suit the case. They cared so little for precedents that a certain Chief Justice, on being reminded that his decision contradicted one he had previously given, quoted the proverb, "Every tub must stand on its own bottom." Many of the judges had not been tied to the law. One, John Dudley, was a farmer and trader. He had little learning of any kind, and seldom spoke good English. But such were his sagacity, discrimination, common-sense, patience and integrity, that he was kept on the bench of the highest court for twelve years. His ideas of law may be seen from a charge he once gave to the jury. "Gentlemen of the jury, you have heard what has been said in this 'ere case by them lawyers, the rascals! but no, I'll not abuse 'em, as 'tis their business to make a good case for their clients. They are paid for it. But you and I, gentlemen, have somethin' else to think of. They talk of law. Why, gentlemen, it's not law we want, but justice! They would govern us by the common law of England. Trust me, gentlemen, common-sense is a much safer guide for us—the common-sense of the towns which have sent us here to try this 'ere case between two of our neighbors. A clear head and an honest heart are worth more than all the law of all them lawyers. There was one good thing said by one of 'em. It was from Shakespeare, an English player, I believe.

No matter. It's good enough almost to be in the Bible. It is this, 'Be just and fear not.' That, gentlemen, is the law in this 'ere case, and law enough in any case. 'Be just and fear not.' It's our business to do justice between this 'ere plaintiff and that 'ere defendant, not by any quirks of the law out of Coke or Blackstone, but by common honesty and common sense, as between man and man. That is our business, and the curse of God is upon us if we neglect, or evade, or turn aside from it. And now, Mr. Sheriff, take out the jury; and you, Mr. Foreman, don't keep us waiting with idle talk; there's been too much of that in this 'ere case, and about matters which don't have nothing to do with it. Give us an honest verdict, of which, as plain, common-sense men, you need not be ashamed." Yet of this unlettered, uncouth man, who had never read a law-book, Chief Justice Parsons, of Massachusetts, the most learned lawyer of his day, said, "You may laugh at his law and ridicule his language, but Dudley is, after all, the best judge I ever knew in New Hampshire." The remark shows that a fearless, honest and strong-minded man, intent on doing right, may wisely administer justice, even if he he knows little of legal technicalities and expedients. It is the purpose to do right that makes a just judge. The same law holds true in all professions. It is those who hold firmly to first principles who win lasting reputation, success and respect. "Be just and fear not." Time is the friend and approver of justice in all events.—*Youth's Companion.*

AFFIDAVITS OF JURORS TO IMPEACH THEIR VERDICT.—On a recent motion for a new trial, before Lord Coleridge and Mr. Justice Butt, a point of practice was incidentally decided, which, so far as we remember, has not been presented to the courts for many years. In support of the motion an affidavit was tendered, made by some or all of the jury, and stating that in giving their verdict they had misapprehended the issues before them. The court unhesitatingly refused to admit the affidavit, on the ground that a jury cannot be heard to impugn their own verdict. If the precedents of the last century are worth anything under our modern practice, there can be no doubt that this decision was correct. The authority chiefly referred to was Clarke v. Stevenson, 2 W. Bl. 803. The facts of this case are not strictly in point, for all that was relied on there as the ground for a new trial was an answer given by one or two of the jury in reply to a question put from the bench after the verdict had been given, the tendency of this answer being to show that the jury had gone against a very clear direction of the judge as to the issue before them. A case rather more to the purpose, though it was not a motion for a new trial, would be that of Jackson v. Williamson, 2 T. R. 281, where the whole jury made an affidavit that in giving a verdict for the plaintiff for £30 they imagined he could get £60 in all, to which amount they considered him entitled. A principle of very wide application as regards cases of this kind is laid down in R. v. Woodfall, 5 Burr. 2661, the "Junius" libel case. Lord Mansfield there says, that, though in cases of doubt as to what passed in giving the verdict, the affidavits of jurors may be read on a motion for a new trial, yet "an affidavit of a juror never can be read as to what he then thought or intended." Lord Mansfield's language on this subject suggests that he would have taken anything but kindly to the modern practice of jurymen writing to the newspapers in defense or explanation of their verdict. It is pretty well settled that a jury cannot be heard to impugn their verdict on the ground of their own misconduct. Certainly they cannot, where the misconduct is that of drawing lots for the verdict. Although this offense is fatal to a verdict, it can only be proved by primary evidence of some one outside the jury, the jury not being allowed to convict themselves of a "high misdemeanor." Lord Mansfield is again the chief authority for this doctrine. Vassie v. Delaval, 1 T. R. 11. The old reports are particularly rich in evidence as to the interpretation which is occasionally put on the oath to "well and truly try." In Aylett v. Jewell, 2 W. Bl. 1299, we have it on the authority of the defendant's attorney that the jury, being hopelessly divided, agreed to put their names on slips of paper into a hat, draw out six, and return a verdict in accordance with the opinion of the majority of these six. One of the queerest verdicts on record is that in Hall v. Payser, 13 M. & W. 600. This was an action on a bill of exchange for £50, and the defendant pleaded that the plaintiff accepted goods in satisfaction. There was no evidence whatever of part satisfaction; it was all or nothing. The jury, however, gave the plaintiff a verdict for £25. The court came to the conclusion that the jury, being unable to agree in any other way, had split the difference between plaintiff and defendant, and they ordered a new trial accordingly. There is a story in 10 M. & W. 137, of two jurymen who were so ill-advised as to go and dine and sleep at the defendant's house at the close of the first day of a trial, though, as the plaintiff did not impugn the good faith of the jury, the court here declined to interfere with the defendant's verdict. Disclosures of the secrets of the jury-box have become less frequent of late years, but it is by no means certain that if they were forthcoming they would not be as interesting as ever.—*Law Times* (London).

MORE ABOUT THE NEW LAW PEERS.—Sir Robert Collier and Sir Arthur Hobhouse are made peers in order to strengthen the legal side of the House of Lords. The former was solicitor-general in the Alabama-Alexandra days, and proved his soundness as a lawyer by the views he took of the obligations of the British Government in respect of stopping the rebel corsairs and rams. He became attorney-general in Mr. Gladstone's administration of 1868; three years later followed his appointment to the judicial committee of the Privy Council; a place worth $25,000 a year. This he still retains. The controversy over that appointment is not forgotten, though it turned wholly on technical points. Sir Robert is a lawyer of learning and ability, with a passion for landscape painting, and an exhibitor in the Royal Academy. Sir Arthur Hobhouse is a public-spirited Englishman who has long served his country in various high capacities, as Charity Commissioner, as legal member of the Indian Council, and finally as member of the judicial committee of the Privy Council; all without pay. Few men have done more or better work; and not a shilling of public money has ever gone into his pocket. His is one of those cases which might make the sourest socialist meditate on the incidental advantage to the public of allowing men to possess private fortunes. Such honor as he now receives comes to him in a shape which still brings no pay, and augments the expenses of life."—*Mr. Smalley in the New York Tribune.*

RELIEF IN EQUITY AGAINST MISTAKES OF LAW."—A learned correspondent writes- "I have read with interest your article in a recent number of CENTRAL LAW JOURNAL, 'Relief in Equity against Mistakes of Law.' I would like to call your attention to the case of Jenkens v. Green, reported in 24 Kansas, 493. This case, it seems to me, is so in conflict with the decisions on the subject it would be a good one to review in your JOURNAL."